NCK WIRE PRODUCTS SDN BHD

v.

MAU JOO SDN BHD & ORS

HIGH COURT MALAYA, SHAH ALAM
MOHD NOOR AHMAD J
[CIVIL SUIT NO: MT1-22-1432-98]
12 DECEMBER 2002

CIVIL PROCEDURE: *Discontinuance - Withdrawal of claims - Discretion of court - Whether justiciable to allow plaintiff liberty to file afresh - Rules of the High Court 1980, O. 21 r. 3(1)*

This was an appeal by the plaintiff against part of the decision of the judge in chambers allowing the plaintiff to discontinue an action against the second, third and fourth defendants but without liberty to file a fresh action against them. The plaintiff had applied for summary judgment against the defendants for the balance of payment and interests for goods sold and supplied to the first defendant. The learned senior assistant registrar dismissed the application; upon appeal to the judge in chambers, the appeal was allowed and judgment entered against the first defendant only. The appeal against the other defendants was dismissed with costs as there were triable issues. The plaintiff filed an application to withdraw the actions against the other defendants with liberty to file afresh as the defendants had contended in their statement of defence that the action was premature due to there being no proper demand made. The withdrawal was allowed but without liberty to file afresh; hence, this appeal.

Held:

[1] Order 21 r. 3(1) of the Rules of the High Court 1980 provides that once 14 days after service of defence had passed, discontinuance may only be granted with leave by the court. The court was empowered to impose terms as it thought just in respect of costs and the bringing of a subsequent action. On the facts, the defendants' contention was flimsy as it was a simple matter for the plaintiff to once again issue a proper notice of demand on the defendants before filing afresh. However, considering that five long years had passed since the guarantee was provided, and the plaintiff's careless attitude in pursuing its claim as demonstrated in the challenge against the notice of demand, to have allowed the plaintiff to start afresh against the defendants would have been an injustice. (pp 534 d & 535 a)

[Appeal dismissed.]

Case(s) referred to:
Fox v. Star Newspaper Company [1898] 1 QB 369
Hess v. Labouchere 14 TLR 350
Mok Hin Wah & Ors v. United Malayan Banking Corp Bhd [1987] 2 MLJ 610 SC

Legislation referred to:
Rules of the High Court 1980, O. 21 r. 3(1)

For the plaintiff - P Sing; M/s Yip & Co
For the defendant - Victor Teo; M/s Lee Swee Seng

Reported by Suresh Nathan

JUDGMENT

Mohd Noor Ahmad J:
This is an appeal by the plaintiff against part of my decision which allowed it to discontinue the action against the 2nd, 3rd and 4th defendants but without liberty to file fresh action against them.

The plaintiff sued the defendants for the sum of RM269,636.29 being the balance of payment and interests for goods sold and supplied to the 1st defendant. Under a letter of guarantee dated 1 April 1996 the 2nd, 3rd and 4th defendants were guarantors up to the limit of RM200,000. The plaintiff applied for summary judgment against the 1st defendant in the sum of RM259,321 with interests and against the other defendants in the sum of RM200,000 with interests. The learned Senior Assistant Registrar dismissed the application with costs. On appeal by the plaintiff to the judge-in-chambers, the appeal was allowed and judgment entered against the 1st defendant with costs; however, the appeal against the other defendants was dismissed with costs as there were issues to be tried.

The main issue to be tried was whether the notice of demand made on each of them was valid? The facts revealed that the notice of demand asked for the sum of RM255,197.08 and whereas the amount limited by the guarantee was only RM200,000. The learned counsel for the defendants submitted that under cl. 1 of the guarantee the liability of the guarantors to pay would arise only after the demand had been made. As the notice of demand asked for a sum in excess of the liability specified in the guarantee, the demand was bad. Hence, the defendants would not be able to comply with the notice of demand as they did not know what amount to pay. Therefore, the condition precedent had not been fulfilled by the plaintiff before suing the defendants. He relied on the Supreme Court case of *Mok Hin Wah & Ors v. United Malayan Banking Corp Bhd* [1987] 2 MLJ 610 which held that since the bank guarantees invariably

specified that the liability of the guarantor was to pay on demand, the words were not devoid of meaning or effect but made the demand a condition precedent to suing the guarantor. To my mind, whether or not the contention will hold water is to be determined at the proper trial of the action where knowledge on the part of the defendants as to the actual amount of their indebtedness would be a material factor to be decided by the court.

The plaintiff did not appeal against the decision of the judge-in-chambers which dismissed the plaintiff's appeal against the other defendants but instead filed an application to withdraw the actions against the other defendants with liberty to file afresh [re encl. (19)]. The main ground for the withdrawal is because the defendants had alleged in their statement of defence that the action was premature as there was no proper demand made. I allowed the withdrawal of the action with costs to the defendants but without liberty to file afresh. Hence, this appeal against the order of without liberty to file afresh.

Order 21 r. 3(1) of the Rules of the High Court 1980 in effect provides that once the 14 days after service of the defence has passed discontinuance may be only with leave, in granting which the court is empowered to impose terms as it thinks just *inter alia* in respect of costs and with regard to the bringing of a subsequent action. The discretion given to the court is wide. The court will consider all the circumstances and if it seems just, can impose a term no other action shall be brought (see *Hess v. Labouchere* 14 TLR 350). In *Fox v. Star Newspaper Company* [1898] 1 QB 369 Chitty LJ referred to the principle behind the rule:

> The principle of the rule is plain. It is that after the proceedings have reached a certain stage the plaintiff, who has brought his adversary into court, shall not be able to escape by a side door and avoid the contest. He is then to be no longer *dominus litis*, and it is for the judge to say whether the action shall be discontinued or not and upon what terms ... . The substance of the provision is that, after a stage of the action has been reached at which the adversaries are meeting face to face, it shall only be in the discretion of the judge whether the plaintiff shall be allowed to withdraw from the action so as to retain the right of bringing another action of the same subject-matter.

In this case, the application was opposed by the learned counsel for the defendants who urged the court to allow the discontinuance but without liberty to file afresh because the action was premature as there was no proper demand made. To my mind, this ground alone is flimsy because it is just a simple matter for the plaintiff to once again issue a proper notice of demand on the defendants before filing afresh. However, having considered all the circumstances of the case, in particular, as nearly five long years had passed since the

guarantee was provided to allow the plaintiff to now start afresh against the defendants would be an injustice. I also take into account of the plaintiff's careless attitude in pursuing its claim as demonstrated in the challenge against the notice of demand.

Therefore, the withdrawal of the action against the defendants is allowed but without liberty to file afresh. The plaintiff is to pay the defendants the cost of this application as well as the cost of the summons for directions (encl. 17).